No. 40

In the Supreme Court of the United States

October Term, 1948.

OKLAHOMA TAX COMMISSION, *Petitioner,*

vs.

THE TEXAS COMPANY.

BRIEF OF THE TEXAS COMPANY.

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IN THE SUPREME COURT OF THE UNITED STATES.
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OKLAHOMA TAX COMMISSION, *Petitioner,*
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Explanatory Remarks.

For convenience the Oklahoma Tax Commission will be referred to herein as "petitioner," and The Texas Company will be referred to as "respondent." Emphasis in the brief is ours unless otherwise stated. References to the transcript of record will be indicated as "R." followed by page number.

Opinion Below.

No opinion was filed by the District Court of Oklahoma County, Oklahoma. The opinion of the Oklahoma Supreme Court (not yet officially reported) was filed on September 23, 1947; order correcting opinion was filed on January 22, 1948, and petition for rehearing was denied on January 27, 1948. The opinion of the Supreme Court of Oklahoma is published in 18 Oklahoma Bar Journal, at pages 1339, *et seq.* (issue of September 27, 1947), and appears at pages 36-39 of the transcript of record. For the convenience of the Court we attach a copy of the opinion (less the caption) as "Appendix I" to the brief.

The order correcting opinion and rendering judgment for respondent for the sum sued for appears on page 44 of the transcript of record.

Jurisdiction.

Since the case presents the question of the constitutionality of certain taxing statutes of the State of Oklahoma under the Constitution of the United States, the jurisdiction of this Court under Sec. 237(b) of the Judicial Code, as amended (New Judicial Code, Sec. 1257(3)) seems to come within same.

Question Presented.

Whether, under the Constitution of the United States, the State of Oklahoma may, in the absence of Congressional consent, impose a gross production tax and a proration or excise tax upon the production of oil by a lessee under a departmental oil and gas lease from restricted lands of wild tribes Indians.

Statement of the Case.

Respondent instituted this action in the District Court of Oklahoma County, Oklahoma, to recover certain gross production taxes and proration or excise taxes which it had paid under protest as an aggrieved taxpayer on account of the production of certain oil, as lessee under departmental oil and gas leases, from restricted lands of certain wild tribes Indians. No congressional consent has been given to the levying of said taxes upon the production of such oil from these wild tribes Indian lands.

Petitioner's demurrer to respondent's petition and amendment thereto were sustained by the trial court, and respondent appealed from this action and from the resultant judgment to the Supreme Court of Oklahoma, which

last named court, with one dissenting justice, reversed the trial court and ordered judgment entered for respondent in the amount sued for, namely, \$3,854.18, being amount of gross production taxes paid in October and November, 1942, on account of the production of oil for the preceding two months, and \$77.74, being proration taxes paid in like months covering the same period of time, or a total of \$3931.92. (R. 7-10) The statement as to these taxes appearing on page 7 of petitioner's brief ~~and totaling~~ \$1936.05 is incorrect.

The petitioner's demurrer to respondent's petition and amendment to petition admitted all the facts set forth in those pleadings, together with all the inferences reasonably to be drawn therefrom.

—*Crews* v. *Garber*, 188 Okl. 570, 111 P. (2d) 1080;
Collar v. *Mills*, 190 Okl. 481, 125 P. (2d) 197;
Farmers, etc., Nat. Bank v. *Lee*, 192 Okl. 9, 132 P. (2d) 931.

Respondent alleged the execution of the three departmental oil and gas leases and their approval by the Secretary of the Interior; their ownership by respondent; that the lands covered by the leases were lands of these wild tribe Indians; that the title to said lands remained in the United States of America which held same in trust for the respective restricted Indian allottees to whom said lands were respectively allotted, and were subject to the supervision and control of the United States of America; that the oil and gas leases covering said land were (except as to a fractional interest in one of the tracts as to which supervision had been released) also subject to the supervision and control of the United States; and that said leases were executed pursuant to the provisions of the General Allotment Act (Chap. 119, 24 Stat. 388) and of acts amendatory thereto. (R. 3-5, 29-30)

Respondent further alleged that in the operation of said leases and in the production of oil thereunder it and each of said leases was and is a Federal instrumentality and agency, or an instrumentality of the United States Government; that the petitioner required respondent to pay the gross production taxes and proration taxes in question; that respondent was not liable for the payment of such taxes for the reasons stated and that accordingly the taxing statutes in question were inapplicable thereto; but that if said taxing statutes were held applicable to the production of said oil, then that such statutes and the taxes sought to be levied thereby were illegal and void and violative of the United States Constitution as imposing a burden and restriction upon an agency and instrumentality of the United States Government, and interfered with the performance of respondent's duties and functions as such an instrumentality and agency; that the imposition of such taxes infringed upon and attempted to restrict and burden the Government's plenary powers in the administration and conduct of the properties and affairs of its Indian wards; that said taxes, and the statutes purporting to levy same, imposed and constituted a substantial and exhorbitant burden and hindrance upon an agency or instrumentality of the United States Government, namely, said oil and gas leases, and the Government in the discharge of its duties and obligations as guardian of its said Indian wards, and respondent as lessee under said leases in the performance of its duties and obligations as such lessee; and further that such statutes and such taxes so imposed materially and substantially interfered with, hindered and impaired the usefulness and efficiency of such agencies or instrumentalities in serving the United States Government (R. 6-7, 30)

ARGUMENT and AUTHORITIES.

I.

A state has no power, in the absence of congressional consent, to levy a direct tax upon the functioning of a Federal agency or instrumentality.

It will be our purpose in this brief to consider this rule of Constitutional law in the light of the basic principles governing same, the limitations which have confined its application within safe and reasonable bounds, and the presently recognized status of the doctrine, particularly as related to the production of oil by a lessee under a departmental lease covering restricted wild tribes Indian lands. Discussion will also be had of the temporary *extension* of the doctrine to include *net income* resulting from the operations of a Federal instrumentality, and of the subsequent decisions of this Court holding that such *extension* is unwarranted and should no longer be upheld.

A. *The Basic Constitutional Doctrine.*

One of the necessary results flowing from our dual system of government is that neither government has the power to interfere with or encroach upon the other in the discharge of its government functions. This principle became established shortly after the formation of the Federal Union and the adoption of the United States Constitution. The leading early case is, of course, that of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579. In holding that although the bank was subject to state taxes upon its real estate (ad valorem taxes) it could not be subjected to a state tax *upon its operations as a Federal instrumentality*, the court, speaking through Chief Justice MARSHALL, on pages 436-437, said:

"This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. *But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.*"

In many later decisions this principle has been consistently applied and enforced, and it is only what the court has regarded as an unwarranted *extension* of the doctrine, namely, it application, at least one step further removed from the operations of the instrumentality, and to *income* derived from such operations, that has brought criticism. This resulted in the abrogation, not of the doctrine itself, or of its application to the functioning of a Federal instrumentality as such, but of such unwararnted *extension,* as we shall presently see. Other limitations of the doctrine, clearly distinguishable from the instant case, will also be noted.

In *Western Union Tel. Co.* v. *Texas,* 105 U. S. 460, 26 L. ed. 1067, this Court held invalid a state tax in so far as imposed on messages sent by public officers on business of the United States. We quote from the opinion as follows:

"As to the government messages, it is a tax by the state on the means employed by the Government of the United States to execute its constitutional powers and, therefore, void. It was so decided in *McCulloch* v. *Maryland,* 4 Wheat. 316, and has never been doubted since.".

In *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 75 L. ed. 1277, the court speaking through Mr. Justice Van Devanter said on page 575:

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states, and that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. *Collector* v. *Day*, (*Buffington* v. *Day*) 11 Wall. 113, 125, 127, 20 L. ed. 122, 126, 127; *Willcutts* v. *Bunn*, 282 U. S. 216, 224, 225, *ante*, 304, 306, 71 A. L. R. 1260, 51 S. Ct. 125. *Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute.* *McCulloch* v. *Maryland*, 4 Wheat. 316, 430, 4 L. ed. 579, 607; *United States* v. *Baltimore & O. R. Co.*, 17 Wall. 322, 327, 21 L. ed. 597, 599; *Johnson* v. *Maryland*, 254 U. S. 51, 55, 56, 65 L. ed. 126, 128, 129, 41 S. Ct. 16; *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505, 66 L. ed. 338, 340, 42 S. Ct. 171; *Crandall* v. *Nevada*, 6 Wall. 35, 44-46, 18 L. ed. 745, 747, 748."

In the case of *Johnson* v. *Maryland*, 254 U. S. 51; 65 L. ed. 126, it was held that a state could not require an employee of the Post Office Department to obtain a license by submitting to an examination and paying a fee of $3.00 in order to drive a truck in the performance of his duties. This amount seems very small, but the principle involved is inviolable. The court, speaking through Mr. Justice Holmes, said:

"With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430) and that is the law today. *Farmers & M. Sav. Bank* v. *Minnesota*, 232 U. S. 516, 525, 526, 58 L. ed. 706, 711, 34 Sup. Ct. Rep. 354."

Where the national government acts through a certain instrumentality in the performance of duties and obligations devolving upon it, that is to say, in the performance of governmental functions, such an agency becomes a Federal instrumentality. An example of this is found in the case of *Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21, 84 L. ed. 11, which denied to the State of Maryland the asserted right to impose upon said corporation a tax of ten cents for every $100.00 as a prerequisite to the recording of its mortgages. The case holds that Congress has the power not only to create a corporation to facilitate the performance of governmental functions through it, but also to protect the operations thus validly authorized. The court, speaking through Mr. Chief Justice HUGHES, on pages 32-33 said:

"* * * the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421, 422, 4 L. ed. 579, 605; *Smith* v. *Kansas City Title & T. Co.*, 255 U. S. 180, 208, 209, 65 L. ed. 577, 588, 589, 41 S. Ct. 243; *Graves* v. *New York, supra*. Congress has not only the

power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. 'A power to create implies a power to preserve.' *M'Culloch v. Maryland, supra* (4 Wheat., p. 426, 4 L. ed. 606)."

Congress in its broad plan to encourage and assist home ownership by the citizens of our nation might, instead of creating and utilizing a national corporation, have conducted these activities through a corporation or corporations organized by a state, in which latter event such agencies would have become Federal instrumentalities. So, in the development and operation of the lands of its Indian wards for mineral purposes, the United States Government has duties and obligations to perform. These are governmental functions, and have been so held since the very beginning. Conceivably Congress might have created its own corporation to prospect for oil and gas on said Indian lands, to drill wells, and to produce and market the products. Instead, it elected to do these things through corporations or other operators assumed to be particularly skilled and equipped for this work. The fact that it constituted these lessees as agents or instrumentalities to do the same thing that it might have done through a nationally organized corporation does not change the legal status. Such lessees, to the extent that they are engaged in the production of oil and gas under departmental leases covering restricted Indian lands, are and have uniformly been held to be Federal instrumentalities.

The central government may and does exercise its powers and functions through many agencies and instrumentalities—sometimes through corporations existing under Federal law, and sometimes through those organized under state law. Except for the utilization of existing agencies,

Congress would be forced to the deplorable necessity of creating a large number of new corporations to perform such functions. The test in cases such as the present is, not the source of incorporation, but whether or not the taxes in question are sought to be enforced against the *operations* of a Federal instrumentality. This principle has been applied so many times and over such a period of time to operations by a departmental oil and gas lessee engaged in the production of oil and gas from restricted Indian lands, that we feel that we may turn our attention to cases involving this precise situation.

B. *The Departmental Lessee Under a Restricted Indian Lease Is, in the Operation Thereof, a Federal Instrumentality.*

Since the United States Government has plenary powers over restricted Indians and their lands, and exercises supervision, jurisdiction and control over oil and gas mining leases executed pursuant to its authorization and covering such restricted lands, it necessarily follows that the lessee engaged in the operation of such a lease is a federal agency or instrumentality. This is true both under the decisions and as a necessary consequence of the inherent nature of such an activity.

1. *Both the Supreme Court of the United States and the Oklahoma Supreme Court hold that the oil and gas lessee under a Departmental lease covering restricted Indian lands is a Federal instrumentality.*

The case of *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, 60 L. ed. 779, dealt with an attempted tax by the State of Oklahoma imposed upon an assignment of an oil and gas lease covering restricted

lands in Osage Nation. It was held that this amounted to a burden placed upon a Federal agency or instrumentality and was therefore void. The case follows the reasoning of and cites in support of the decision, the case of *Choctaw, O. & G. R. Co. v. Harrison, infra*, and holds that such a tax cannot be enforced for the reason that it is an attempt to tax an instrumentality through which the United States was performing its duties to the Indians. (See page 530.)

The Oklahoma Supreme Court in the case of *Large Oil Co. v. Howard*, 63 Okl. 143, 163 Pac. 537, decided in 1917, upheld the Oklahoma gross production tax as to oil produced under a restricted Indian lease, upon the theory that this did not impose a tax upon the operations of the lessee, or upon its right to engage in or continue its business as such lessee, but only upon the commodity which it thus produced, and which tax was imposed in full and in lieu of, or as a substitute for other taxes which might be levied. This is the same argument which is made by our opponents, and also advanced by the Solicitor General in the *amicus curiae* brief some thirty years later! The decision of the Oklahoma Supreme Court was reversed by this Court. *Large Oil Co. v. Howard*, 248 U. S. 549, 63 L. ed. 416. This Court had previously held invalid such a tax, applying the same principle in the memorandum decision of the case of *Howard v. Gypsy Oil Co.*, 247 U. S. 503, 62 L. ed. 1239, at the preceding term.

When, in 1935, the Oklahoma Supreme Court again considered this matter, the fact that an oil and gas lessee under a restricted Indian lease was a governmental instrumentality was held to be no longer debatable. In holding that such a lease is a Federal instrumentality not subject to state taxation (as to imposition of the proration tax in

that case) the Court, speaking through Justice WELCH, in the case of *Barnsdall Refineries, Inc.*, v. *Oklahoma Tax Commission*, 171 Okl. 145, 41 P. (2d) 918, said:

> "*It is now beyond question that the oil leases held by the plaintiffs are governmental instrumentalities, and that the State of Oklahoma, may not impose any tax thereon without the consent of the United States Government. Carter Oil Company* v. *Oklahoma Tax Commission*, 166 Okl. 1, 25 P. (2d) 1092; *Choctaw, O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, 35 S. Ct. 27, 59 L. ed. 234; *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522, 36 S. Ct. 453, 60 L. ed. 779; *Howard* v. *Oklahoma Oil Company*, 247 U. S. 503, 38 S. Ct. 426, 62 L. ed. 1239; *Large Oil Co.* v. *Howard*, 248 U. S. 549, 39 S. Ct. 183, 63 L. ed. 416; *Gillespie* v. *Oklahoma*, 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 46 S. Ct. 592, 70 L. ed. 1112. And it seems to be conceded by the defendants that this tax could not be levied and collected without the consent of the United States Government."

That case was appealed to the Supreme Court of the United States and affirmed in an opinion delivered by Mr. Justice STONE, fully upholding the decision of the Oklahoma Supreme Court.

—*Oklahoma, ex rel.* v. *Barnsdall Refineries, Inc.*, 296 U. S. 521, 80 L. ed. 366.

In at least two cases involving the production of hard minerals by lessees under leases covering restricted Indian lands the same principle was applied, it being held that such lessees were, in the operations conducted under the leases, Federal agencies or instrumentalities.

—*Choctaw O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, 59 L. ed. 234;

Jaybird Mining Co. v. *Weir*, 271 U. S. 609, 70 L. ed. 1112.

2. *A marked degree of supervision and control over the operations under such Departmental leases is retained.*

Not only do the decisions consistently hold that the lessees operating under such departmental oil and gas leases are Federal instrumentalities but the Acts of Congress, the leases themselves, and the Rules and Regulations promulgated by the Secretary of the Interior confirm this relationship in fact. That such leases are Federal instrumentalities is not a mere legal fiction; the existent relationship is real and practical.

As illustrative of provisions of the leases (R. 11-19) disclosing supervision and control retained over the lessee's operations we quote therefrom as follows:

> "3(f) * * * to carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and preservation of the property and the health and safety of workmen;
>
> "3(g). *Regulations.* To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases: Provided. That no regulations hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease.
>
> "10. *Drilling and Producing Restrictions.* It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judg-

ment the Secretary may take into consideration, among other things Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.

"13. *Conservation.* The lessee in consideration of the rights herein granted agrees to abide by the provisions of any Act of Congress, or any order or regulation prescribed pursuant thereto, relating to the conservation, production, or marketing of oil, gas, or other hydrocarbon substances."

Said leases were, of course, executed pursuant to the provisions of the General Allotment Act (24 Stat. 388) and of acts amendatory thereof, and of the Act of March 3, 1909, (35 Stat. 781, 783). An elaborate system of supervision and control by the Government, of the operations of such a departmental oil and gas lease has been provided and is maintained. The Court is referred to Title 25, 189.1-189.33, of the Code of Federal Regulations (hereafter cited as "CFR") for general coverage of the "Leasing of Certain Restricted Allotted Indian Lands for Mining," the source therefor being stated in footnote to 189.1. In 189.24 it is provided:

"Lessees will be required to carry out and observe the operating regulations now or hereafter in force governing oil and gas operations on restricted Indian lands."

Pursuant to statutory authority which we deem unnecessary to detail, but which is set out in the foot-note to 30 CFR 221.1, many rules and regulations governing the lessee's operations of an oil lease covering restricted Indian lands have been promulgated. Reference is had to Title 30 CFR 221.1-221.56 for greater particularity. The regulations are administered (except as to lands within naval

petroleum reserves) under the Director of the Geological Survey. Among other provisions in the Regulations are those providing that the Supervisor or his representatives may exercise general supervision and inspection of lessee's operations (221.5 (a)); may require correction *in a manner to be approved by him* of any condition which is causing or likely to cause damage to any formation containing oil, gas, etc.; require vertical drilling when necessary to protect interests in other properties, etc. (221.5 (e)); fix percentages of potential capacities (221.5 (f)); approve well-spacing and well-casing programs (221.5 (g)); and suspend and shut down operations under certain conditions (221.5 (k)). Before commencing any operations the lessee must submit the proposed program and obtain the consent and approval of the supervisor; likewise approval must be first obtained as to many other operations in connection with the development and operation of the land for oil and gas purposes, as, for example, drilling, re-drilling, plugging back, shooting the well, acidizing, using vacuum, etc. (221.9).

Provisions too numerous to delineate are set out in succeeding subdivisions, but the above will illustrate the direct and effective supervision and control exercised over the operations of a departmental oil and gas lessee, and clearly distinguishes this situation from that existing under the ordinary commercial oil and gas lease.

3. *Petitioner impliedly concedes that respondent is a Federal instrumentality.*

We have perhaps devoted more space than necessary to the discussion of the relationship brought about by the departmental leases in question, since the petitioner apparently concedes that respondent was a Federal instrumentality in the operation of its leases. On page 41 of petition-

er's brief, in speaking of the *Mountain Producers Corp.* case (*infra*), it is said:

> "However, we do not contend that the *Mountain Producers* case overruled these cases on the proposition that an entity *occupying the position here occupied by the appellees is not a Federal instrumentality.*"

In spite of this apparent concession we wished to have the true existent relationship clearly before the Court, for it is this which unmistakably differentiates the instant case from cases relied upon by our opponents, as we shall presently show. We trust, therefore, that we have not tried the patience of the Court too far by going into this phase of the case as fully as we have.

C. *A State Cannot, in the Absence of Congressional Permission, Place a Tax Upon the Operations of a Restricted Indian Lease, Measured by the Production of Oil Therefrom.*

Having established the fact that the operator of a departmental oil and gas lease covering restricted Indian lands is a true Federal instrumentality, the inescapable result is that the state cannot impose a tax upon the operation thereof without congressional consent. The doctrine in its broadest concept has already been presented, but we wish now to show its application to departmental leases (both solid minerals and oil and gas) covering restricted Indian lands.

In *Choctaw O. & G. R. Co.* v. *Harrison*, *supra*, decided in 1914, the State of Oklahoma was held powerless to impose a gross production tax upon coal mined under a departmental lease covering restricted Indian land. The same result was reached in 1926 relative to the production of ore from restricted property of a Quapaw Indian, leased by the

Government for development, in the case of *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 70 L. ed. 1112. We quote from the opinion by Mr. Justice BUTLER on pages 612-613 as follows:

"The Quapaw Indians are under the guardianship of the United States. The land and Indian owners are bound by restrictions specified in the patent and the acts referred to. It is the duty and established policy of the Government to protect these dependents in respect of their property. The restrictions imposed are in furtherance of that policy. *United States* v. *Noble*, 237 U. S. 74, 59 L. ed. 844, 35 Sup. Ct. Rep. 532; *Goodrum* v. *Buffalo*, 89 C. C. A. 525, 162 Fed. 817. *The lessee is an agency or instrumentality employed by the Government for the development and use of the restricted land and to mine ores therefrom for the benefit of its Indian wards. Choctaw O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27. *It is elementary that the Federal Government in all its activities is independent of state control.* This rule is broadly applied. *And without congressional consent no Federal agency or instrumentality can be taxed by state authority.* 'With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579.' *Johnson* v. *Maryland*, 254 U. S. 51, 55, 65 L. ed. 126, 128, 41 Sup. Ct. Rep. 16. And see *Farmers & M. Bank* v. *Minnesota*, 232 U. S. 516, 58 L. ed. 706, 34 Sup. Ct. Rep. 354; *Choctaw O. & G. R. Co.* v. *Harrison, supra*; *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505, 66 L. ed. 338, 340, 42 Sup. Ct. Rep. 171."

The principle of these cases, of course, applied to mining operations for oil and gas as well as for solid minerals, and the case of *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, *supra*, wherein this Court held void an at-

tempt by Oklahoma to impose a tax upon an assignment of an oil lease covering restricted lands in Osage Nation, has already been called to the Court's attention.

Other cases dealt with the state gross production tax as applied to the production of oil, the same principle being announced.

—*Howard v. Gypsy Oil Co., supra;*
Large Oil Co. v. Howard, supra.

In *Oklahoma, ex rel.,* v. *Barnsdall Refineries, supra,* the much smaller proration tax of 1/8 cent per barrel was held void as to oil produced under departmental lease from lands in the Osage Nation, for the reason that Congress had not consented to the imposition of the tax. There have been no changes, either in this Court or in the Supreme Court of Oklahoma, relative to the principles announced in these decisions as applicable to the production of oil and gas from restricted Indian lands, and said decisions reflect the law as it now exists in both courts.

1. *The tax in question is a real burden.*

In petitioner's brief, and also in the *amicus curiae* brief filed by the Solicitor General it is argued that the gross production taxes in question constitute no real burden, and should, in effect, be ignored. For example, it is argued that the same rental and royalty payments prevail regardless of whether the gross production taxes are enforceable, and from this the inference is sought to be drawn that the tax constitutes no burden on the Federal instrumentality. This completely ignores the fact that a lease which is free from this state tax of 5% of the value of the oil produced is more attractive and brings more in the way of a bonus at competitive bidding than one which is subject to such tax. And

the United States, or its governmental agencies, receives the *added income* for the benefit of its Indian wards.

In *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 72 L. ed. 256, wherein it was held that *income* resulting from the operations of a restricted oil lease is subject to *United States* income taxes, the Court had occasion to consider the nature of such a lease and of the principles applicable thereto. We quote from the opinion on page 234 as follows:

> "* * * *the lease is merely the instrument which the government has chosen to use in fulfilling its task of developing to the fullest the lands and resources of its wards, and a state may not by taxation lessen the attractiveness of leases for such purpose. Gillespie* v. *Oklahoma*, 257 U. S. 501, 66 L. ed. 338, 42 Sup. Ct. Rep. 171; *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522, 60 L. ed. 779, 36 Sup. Ct. Rep. 453; and see *Choctaw O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27; *Jaybird Min. Co.* v. *Weir*, 271 U. S. 609, 70 L. ed. 1112, 46 Sup. Ct. Rep. 592. * * *"

Unquestionably the United States, as guardian and trustee for its Indian wards, has a direct financial interest in upholding the immunity of its instrumentality from this tax. Far greater, however, is its interest that its agency through which it performs certain governmental functions be unhampered and free from any burden or interference in the performance of those functions.

It is entirely a false premise to say that the taxes in question do not constitute a burden on operations. Under the statement of the case it appears that the taxes for the two months for which the present suit was brought amount to more than $3,900.00. It is well known that in the operation of many leases, that amount, or the amounts applicable to the leases in question, could spell the difference between profit-

able and unprofitable operation, and so might force an instrumentality of the government to cease functioning. Such a result would certainly not be tolerated by the courts in so far as affects the National Government; also it would entail serious loss and hardship upon the instrumentality itself.

It is the purest sophistry for petitioner to argue that the taxes involved in the present action do not constitute a burden upon the oil and gas leases in question and upon the operations of the lessee. If, as was held by both the Oklahoma Supreme Court and the United States Supreme Court, the proration tax of 1/8 cent per barrel was such a burden upon a federal instrumentality as to result in the tax being declared void (*Barnsdall Refineries, Inc.,* v. *Oklahoma Tax Commission, supra; Oklahoma* v. *Barnsdall Refineries, Inc., supra*), then clearly the same tax of 1/8 cent per barrel *plus* an additional tax of *five per centum of the value of the oil* is likewise such a burden as to result in such taxes being declared unconstitutional!

In view of the actual and substantial financial burden flowing from an enforcement of these gross production and proration taxes, and in further consideration of the fact that not only is this admitted by the demurrer of petitioner, but also that petitioner expressly stated in the Oklahoma Supreme Court that the amount of the taxes pleaded by respondent was correct, in order to have that court render an appealable judgment, it is now absurd for petitioner to argue that no burden results from an enforcement of such taxes. This is simply contrary not only to the pleadings, but also the known *and admitted* facts.

2. *The Oklahoma Legislature has interpreted the tax exemption as existent.*

Our opponents have called attention to certain portions of the Oklahoma Gross Revenue Taxing Act, but have failed to include a section which we consider very pertinent as containing a legislative interpretation of the Act, namely, that the Legislature recognizes the fact that, except as to certain Indian lands as to which Congress has given its consent to the levy of the tax, oil produced from restricted Indian lands is exempt from the gross production taxes.

The section to which we refer is 68-832*, O. S. A., which became law on its approval April 2, 1925, and which provides for refund (among other reasons) where gross production taxes are paid "in error on account of *the production being derived from restricted Indian lands and therefore exempt from taxation.*" This provision was not exclusive, but was additional to the statutory procedure adopted by the respondent in the instant case, namely, payment under protest and suit to recover back pursuant to 68-1475, O. S. A.

Oklahoma had had a gross production law since 1910 (R. L. 1910, Sec. 7464, and later acts), and prior to the passage of 68-832, *supra,* this Court had held that *production* of oil, gas and solid minerals from restricted lands of Indians, under departmental leases, was not subject to taxation by the state. The Legislature, therefore, evidently

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*68-832, O. S. A., is as follows: "In all cases of over-payment, duplicate payment or payment made in error *on account of the production being derived from restricted Indian lands and therefore exempt from taxation,* the State Auditor, by and with the approval of the State Board of Equalization, after an audit by the State Examiner and Inspector, is authorized to refund any such overpaid, duplicate or erroneously paid gross production taxes out of any gross production tax funds in his hands from the same county from which the original tax was derived and not apportioned to the State Treasurer to be distributed as provided by law. Laws 1925, ch. 20, p. 21, Sec. 3."

passed Section 68-832 in 1925 in the light of these decisions, and thereby clearly gave a legislative interpretation that, apart from congressional consent, the Oklahoma gross production taxing statutes had no application to oil produced from restricted Indian lands. This follows the recognized rule that the intention of the Legislature is to be ascertained by all aids available.

—*United States* v. *Goldenberg*, 168 U. S. 95, 42 L. ed. 394;

Cases cited in 59 C. J. 948, *et seq.*

When, therefore, the Oklahoma Legislature passed its later gross production tax laws (Laws 1933, ch. 103, p. 202, Sec. 5; Laws 1935, p. 271, Sec. 1), with 68-832 on the statute books, it seems clear that these later acts are subject to the continued construction carried by 68-832.

D. *Congress Has Not Waived the Immunity from Taxation.*

It is clear from the many cases, *supra*, that in the absence of consent by Congress, or waiver of the immunity, a state has no power to impose a gross production tax upon the production of oil from restricted Indian lands. We will now consider the question of whether there has been any such waiver of immunity.

1. *The fact that Congress has neither waived the immunity nor affirmatively withdrawn the subject-matter from taxation is to be interpreted in the setting of the applicable legislation and the particular exaction.*

We do not contend that every piece of Indian land which is subject to restrictions is tax exempt. There are situations in which the immunity does not exist. Typical of this is the case where non-Indian lands, already on the state's tax

rolls and subject to taxation, are purchased with restricted Indian funds, and where Congress has placed restrictions on the lands so purchased. In such a case, unless Congress affirmatively acts to withdraw the lands from the tax rolls, by declaring them exempt, the implication is that it consents to the land *remaining* subject to taxation. The rationale for this result is that in this situation it would take some affirmative action to *remove* the lands from taxation, and where Congress passively remains silent this is interpreted as a permission for the taxation to continue.

In *Shaw* v. *Gibson-Zahnister Oil Corp.*, 276 U. S. 575, 72 L. ed. 709, it appears that land which was subject to state taxation was purchased for a restricted Creek Indian from restricted funds. A restriction against alienation of the land was imposed by the Secretary of the Interior, pursuant to statutory authority. It was held that the land remained subject to state taxation, as was also the oil lease covering same.

The decision in the above case, written by Mr. Justice Stone, contains an interesting statement concerning certain government instrumentalities which will be held free from state taxation, the following language being used:

> "What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them. *Metcalf* v. *Mitchell*, 269 U. S. 514, 70 L. ed. 384, 46 Sup. Ct. Rep. 172. The end sought and the mode of attaining it adopted by Congress in the legislation providing for the welfare of the Indians by setting apart, by allotment or otherwise, tribal lands or the public domain, restricted for their benefit, led to the conclusion that those lands and the uses of them were so intimately connected with the performance of governmental func-

tions as clearly to require independence of all state control so complete that nothing short of an express declaration by Congress would have subjected them to state taxation.

"Governmental agencies similarly held to be exempt are national banks, *First Nat. Bank* v. *Hartford*, 273 U. S. 548, 71 L. ed. 767, ... A. L. R. ...., 47 Sup. Ct. Rep. 462, bonds of the national government, *Weston* v. *Charleston*, 2 Pet. 449, 467, 7 L. ed. 481, 487; such were and still are the restricted allotted or tribal lands of the Indians; *neither leases of those lands*, *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522, 60 L. ed. 779, 36 Sup. Ct. Rep. 453, *nor the exploitation of the land by the lessee*, *Howard* v. *Gypsy Oil Co.*, 247 U. S. 503, 62 L. ed. 1239, 38 Sup. Ct. Rep. 426; *Large Oil Co.* v. *Howard*, 248 U. S. 549, 63 L. ed. 416, 39 Sup. Ct. Rep. 183; *Choctaw O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27; *Jaybird Min. Co.* v. *Weir*, 271 U. S. 609, 70 L. ed. 1112, 46 Sup. Ct. Rep. 592, *nor his income from the lease*, *Gillespie* v. *Oklahoma*, 257 U. S. 501, 66 L. ed. 338, 42 Sup. Ct. Rep. 171, *may be taxed by the state.*"

It will be observed that of those examples enumerated which are held to be exempt from state taxation even though Congress has not expressly so provided, the law remains unchanged with one exception, namely, *income* resulting from the operation of a restricted lease. As to the *functioning* of the instrumentality itself, however, and specifically *as to the production of oil* by reason of the operations of such a Federal instrumentality, the law remains now, as it was then, that the state cannot burden same with taxes.

Creek County v. *Seber*, 318 U. S. 705, 87 L. ed. 1094, cited on page 30 of the Solicitor General's brief, is another case involving the *continued liability of property to taxation* where it had already been on the tax rolls. The case

is not at all contrary to our position, the same principle being applied as in *Shaw v. Gibson-Zahnister Oil Corp., supra.*

In *Mayo v. United States*, 319 U. S. 441, 87 L. ed. 1504, the question was presented whether Florida could impose an inspection fee on account of fertilizer distributed by the Federal Government to farmers, as part of the soil-building program. It was contended on behalf of the state that since neither the United States Constitution nor any Federal statute exempted the United States from the payment of a reasonable fee, such a fee was valid. The Court held otherwise, even though Congress had not expressly prohibited the collection of the fee.

It is submitted that respondent, as a true instrumentality of the Government so far as the operation of the three leases in question is concerned, comes within the reasoning of this case.

2. ***Before an oil lessee, functioning as a Federal instrumentality under a departmental lease covering lands of restricted Indians, can be subjected to state taxation measured by the value of the oil produced, Congress must give its consent thereto.***

The above principle is included in a number of the cases already presented, intimately connected with the propositions previously discussed; and to avoid redundancy the passages quoted will not be repeated here. See:

Choctaw O. & G. R. Co. v. Harrison;
I. T. I. O. Co. v. Oklahoma;
Oklahoma Tax Commission v. Barnsdall Ref., Inc.;
Howard v. Gypsy Oil Co.;
Large Oil Co. v. Howard;
Jaybird Min. Co. v. Weir,
all *supra.*

In *Maricopa County* v. *Valley National Bank*, 318 U. S. 357, 87 L. ed. 834, it was held that even where Congress had consented to the imposition of a state tax upon a Federal instrumentality (the preferred stock of a National Bank held by the R. F. C. in that case), it could thereafter withdraw such consent. We quote from the opinion by Mr. Justice DOUGLAS, discussing the effect of such Acts of Congress relating to Federal instrumentalities, as follows:

> "*It was conferred by Congress which has under the Constitution exclusive authority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation.*
>
> * * * * * * * * *
>
> "When Congress authorized the states to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. *Its sovereign power to revoke the grant remained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will.*"

That being true, it seems clear that where the consent has never been given in the first place, and where the tax is sought to be imposed upon the *functioning* of a true Federal instrumentality, the state is powerless to enforce the tax.

3. *The fact that permissive acts were passed by Congress and waivers of the tax immunity were made as to the lands of certain other Indian tribes is strongly indicative that, apart from such permissive acts and waivers, the principle of immunity controls.*

As has already been indicated, Congress has in certain particular instances given its consent to the imposition by a state of taxes on a government instrumentality. This was done as to oil produced from lands located in Osage Coun-

ty, Oklahoma, but the permission to impose the tax was limited to the gross production tax and therefore could not even by implication be extended to the much smaller excise or proration tax. (*Oklahoma v. Barnsdall Refineries, supra.*) This waiver of immunity, as to oil produced from Osage County, Oklahoma, was granted by the Permissive Act of March 3, 1921 (41 Stats. at L. 1250).

In addition, Congress gave permission to Oklahoma to impose both the gross production tax and the excise or proration tax on oil produced from restricted lands of members of the Five Civilized Tribes, by act approved May 10, 1928 (45 Stats. at L. 496). As an example of the language employed in such permissive acts we quote Section 3 of the act last referred to, whereby Congress allowed such state taxes to be imposed upon all minerals, including oil and gas, produced from restricted allotted lands of members of the Five Civilized Tribes:

> "Sec. 3. That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all state and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production."

A similar permissive act allowing the imposition of the Oklahoma Gross Production Tax on oil produced from re-

stricted homestead allotted lands of the Kaw Indians was approved May 27, 1924 (43 Stats. at L. 176-177). However, Congress has never given its consent to the imposition either of the gross production tax or of the proration tax upon the production of oil from restricted lands of the Apache and Kiowa Indians, and it follows that lessees under departmental leases covering those lands, as Federal Instrumentalities, are immune from taxes imposed upon them in the performance of their duties.

These permissive acts, expressly confined to the particular Indians and their lands embraced therein, have been passed from time to time covering a period of some 27 years. During all of that time the decisions of this Court have been to the effect that in the absence of such congressional consent the state is powerless to impose a tax of the character in question upon the production of oil under such a departmental lease. Where the consent has been granted by appropriate Act of Congress it has been given effect by this Court; where Congress has remained silent and no consent has been given this Court has repeatedly declared that the attempted taxes were unconstitutional and void. Yet in the face of that record, our opponents now come forward with the absurd argument that Congress should be deemed *impliedly* to have given its consent with regard to the production of oil from Apache and Kiowa lands! There is nothing in the course adopted by Congress, in the administration by the Department of the Interior, or in the decisions of this Court to substantiate such a claim.

If the consent of Congress to the imposition of the tax had not been necessary, then what sense can we make out of the fact that permissive acts have been passed from time to time over such a long period of years, and made applicable to certain designated Indians? Are we to attribute

to Congress, and to many successive Congresses, the doing of such a vain and foolish thing? And are we to assume that this Court, in its long line of decisions, has overlooked this "implied consent" now being suggested by our opponents? Rather, it seems to us that plain common-sense logic should prevail. The mere fact that Congress has granted its consent as to certain Indians, but not as to others, and that this differentiation has been recognized and given effect by this Court shows unmistakably that such an Act of Congress, affirmatively extending the permission to tax, is required before the state can act. Unless this were so, the entire doctrine of the immunity of a Federal instrumentality from state taxation imposed upon its functioning might be swept away, for in each instance the claim would be made that Congress had given its "implied consent"!

(*a*) Such Waivers of Immunity Are Strictly Construed.

The waiver of immunity under discussion is an act of the sovereign. For the immunity here considered is that surrounding an instrumentality of the sovereign in the performance of its functions. Thus, the sovereign, and the sovereign only, can waive the immunity. For that reason it is held that where such waivers are in fact made, they must be strictly construed. No extension by implication will be indulged in.

As well illustrating this principle, the case of *Oklahoma, ex. rel.*, v. *Barnsdall Refineries, Inc., supra*, is again called to the attention of the Court. That case dealt with the right of the State of Oklahoma to impose the excise or proration tax of 1/8 of one cent per barrel upon oil produced under a restricted Osage lease. The gross production tax was not involved for the reason that Congress had, on March 3, 1921, passed an Act (41 Stats. at L. 1250) permitting the

state to impose the gross production tax on Osage land, but remaining silent as to the much smaller proration tax. The Oklahoma Tax Commission contended that since Congress had consented to the imposition of a tax upon the gross production of oil, the state could enforce the proration tax as, by implication, being within the terms of such consent. This contention was denied, both by the Oklahoma Supreme Court and this Court. On page 526 of this Court's opinion we find this language:

> "Construing that consent with the strictness appropriate to the interpretation of a waiver of a defined tax immunity of the sovereign, we think the conclusion of the state court was right."

(*b*) The Authorities Cited by Petitioner Are Not in Point.

On page 43 of petitioner's brief we find cited the case of *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U. S. 159, 81 L. ed. 95, accompanied by the remarkable statement that by said case "the correctness of our contentions is established." An examination of the case shows that it is not in point, except as affording another example of an Act of Congress giving permission to states to impose taxes on production of oil from certain Indian lands therein specified. The Congressional Act in question consented to the taxes only upon "*unallotted* lands on Indian reservations" (other than lands of the Five Civilized Tribes and Osage Reservation), but on no other land. The oil in the *British-American* case was produced from lands of the Blackfeet Indians in Montana, under a lease authorized by the tribal council and approved by the Secretary of the Interior. Trust patents (*carrying surface rights only*) had been issued for the benefit of the several Indian allottees, and because of this the oil producer contended that

these were not "unallotted" lands (as to which Congress had consented to the taxes); but had been allotted, and that accordingly the consent of Congress to the imposition of the tax did not apply. The fault with this reasoning was that under the Act and under the trust patents there was "*a reservation for the benefit of the tribe of all minerals, including oil and gas, in or under the allotted land,*" by reason whereof this Court held that so far as the mineral interest (oil and gas) covered by the leases was concerned "it is tribal land, and is *unallotted*" (pages 161, 164, 165 of the opinion). This meant that the consent of Congress to the imposition of the tax had been given as to these "unallotted" Blackfeet lands. The facts are brought out in greater detail in the case below, 101 Mont. 293, 54 Pac. (2d) 129.

The facts are obviously dissimilar to those of the instant case, and the Act of May 29, 1924, has no application here. *For in the case of the Apache and Kiowa Indians there was no reservation to the tribes, either by Act of Congress or in the trust patents, of oil or gas or other mineral interests.* The lands involved in the instant case had been allotted in severalty and trust patents issued therefor. So that as to the lands with which we are here concerned, they were "allotted" lands, both as to surface and as to minerals, and could not possibly be affected by the Act relating to "unallotted lands on Indian reservations" which was held to apply to the Blackfeet Indians on their reservation in Montana.

The other case relied upon by petitioner in support of its claim that Congress has consented to the state's imposition of the tax in question is that of *Carter Oil Co. v. Oklahoma Tax Commission*, 166 Okl. 1, 25 P. (2d) 1092, cited on page 43 of petitioner's brief. That case is as far afield

in sustaining petitioner's contentions as is the decision last above discussed. It simply holds that under the Act of May 10, 1928 (45 Stats. at L. 495), giving Congressional consent to the imposition of state taxes on oil and gas, etc., produced from restricted allotted lands of members of the *Five Civilized Tribes*, gross production taxes on oil produced from lands of a member of one of said five tribes are valid and enforceable.

The decision contains an admirable statement by Justice WELCH relative to the required consent for the imposition of such a tax upon an instrumentality of government. We quote from the opinion on page 1094 of the Pacific Reporter as follows:

> "It is clear that the rule is that the federal government and the state government must be each permitted to function through its proper agencies or instrumentalities without undue interference or hindrance from the other. And in keeping with that principle it is reasoned in the decisions above cited that a federal tax imposed upon a state instrumentality may unduly burden that instrumentality, and that a state tax imposed on a federal instrumentality may unduly burden the same, and therefore that neither federal nor state tax should be permitted to be imposed upon an agency or instrumentality of the other government *without the consent of the other government*. In *Jaybird Mining Co. v. Weir*, 271 U. S. 609, 46 S. Ct. 592, 593, 70 L. ed. 1112, it was held that, 'without congressional consent, no federal agency or instrumentality can be taxed by state authority.' We conclude that it is equally clear that such a tax might be lawfully imposed by and with proper consent." (Emphasis by the Court.)

Thus it will be seen that both the cases cited by petitioner on this proposition missed the mark. We are pleased to observe that the Solicitor General did not cite these cases.

II.

The immunity of a Federal instrumentality from State taxation is not extended so as to exempt private property from ad valorem taxes.

It is pointed out that private property of a Federal instrumentality is subject to ad valorem taxes imposed by a state, and from this it is argued that the gross production tax, levied in lieu of ad valorem taxes as to equipment in and about a producing lease, should be sustained. It is a clear case of *non sequitur*.

It is, of course, well established that the private property of a Federal instrumentality may be subjected to the state ad valorem tax, even though such private property is employed in carrying out the duties and obligations of such instrumentality.

—*Susquehanna Power Co. v. State Tax Commission*, 283 U. S. 291, 75 L. ed. 1042.

Applying this principle, this Court held in *Taber v. Indian Territory Illuminating Oil Co.*, 300 U. S. 1, 81 L. ed. 463, that the state could levy an ad valorem tax upon property of a lessee used in operations under a lease covering Indian lands; also that the oil produced by the lessee of restricted Indian lands, after being commingled with oil from other sources, is subject to an ad valorem tax. *Indian Ty. Illuminating Oil Co. v. Board of Equalization*, 228 U. S. 325, 77 L. ed. 812. But this does not at all mean that the state can lay a tax upon the *production* of the oil, for that would constitute a tax upon the *functioning* of a Federal instrumentality, which is permissible only with the consent of Congress. This very distinction is emphasized in the two cases last cited.

The argument has been advanced that since Oklahoma has the right to levy an ad valorem tax on equipment around a lease, it can impose a gross production tax upon the functioning of a Federal instrumentality *in lieu thereof*. This begs the question. Just because a state might legally levy a tax within constitutional limits does not give it the power to levy an "in lieu," but illegal tax, beyond constitutional limits, even though in an equivalent amount. If it could do this, then it would be an easy matter to circumvent the Constitution. For example, in order to override the decisions of this Court declaring that a gross production tax upon the production of oil by a lessee from restricted Indian land is void, all that would be necessary (under this contention) would be for the state legislature to declare that such unconstitutional tax was *in lieu* of some other tax that the state might legally have levied. The absurdity of the argument is apparent! And yet, is not that in effect what petitioner is asking this Court to hold? This contention on behalf of petitioner is effectively answered in the case of *James* v. *Dravo Construction Co.*, 302 U. S. 134, 82 L. ed. 155, in the following language, found at page 158:

> *"But if the tax as actually laid upon the gross receipts placed a direct burden upon the Federal Government so as to interfere with the performance of its functions, it could not be saved because it was in lieu of a tax upon property or was so characterized."*

The real nature of such a gross production tax levied upon products mined was considered and declared by this Court in *Choctaw, O. & G. R. Co.* v. *Harrison, supra.* In that case the contention was made on behalf of the State of Oklahoma that its gross production tax on coal dug from mines on lands of Choctaw and Chickasaw Indians was really a property tax, and this contention was upheld by the

Oklahoma Supreme Court. This Court, however, held that it was the real nature of the tax which counted, and not what some legislature might call it. We quote from the opinion by Mr. Justice McReynolds as follows:

"Neither state courts nor legislatures, by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect. *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638.

* * * * * * * * *

"The requirement is not on account of property owned on a given day, as is the general custom where ad valorem taxes are provided for, and as the Oklahoma laws require; but the manifest purpose is to reach all sales and secure a certain percentage thereof—a method commonly pursued in respect of license and occupation taxes. *Pullman Co. v. Knott* (decided at the present term (235 U. S. 23, *ante*, 105, 35 Sup. Ct. Rep 2)).

"A tax upon a merchant's, manufacturer's, or miner's gross sales is not the same thing as one on his stock treated as property. Cooley, Taxn., 3d ed., p. 1095. The former is upon his business. *In effect, the Oklahoma act prescribes an occupation tax* (*Ohio Tax Cases*, 232 U. S. 576, 592, 58 L. ed. 738, 745, 34 Sup. Ct. Rep. 372); and, accepting as true the allegations of appellant's bill, we think it cannot lawfully be subjected thereto."

It is clear, under the decisions of this Court, that such a gross production tax, measured by the value of the product mined, is a privilege or occupational tax, and neither an expression of a state court, nor the arguments of our opponents can change its inherent nature.

It is further argued that under 68-821 O. S. A. the gross production tax may be raised or lowered to make it

conform to what the ad valorem taxes would have been on the property of the producer subject to taxation in the district or districts where situated. (Brief of Solicitor General, pp. 9, 25.) These intricate provisions could not give the stamp of validity to an otherwise unconstitutional law. Nor would they deprive a taxpayer of the rights afforded him by the recognized statutory procedure of protesting the exacted payment of illegal taxes, and of suing to recover same—a proceeding recognized in cases too numerous now to be questioned. (See 68-1475 O. S. A., as set out in Appendix II hereto.) Furthermore, the suggested provisions of 68-821 are inapplicable to the situation here, and do not afford an adequate relief. A reference to the statute in question (see Solicitor General's brief, pp. 44-45) shows that in the attempted equalization, there would be taken into consideration, not just the property of the producer on the particular lease from which the oil is being produced, but all producer's property in the "district or districts," and *also* the value of oil, gas and mineral leases, etc., machinery and equipment around wells or mines, *the value of the oil, gas, etc., produced,* and other elements of value. This last alone shows that these cumbersome provisions are inapplicable to the situation presented here. And if they were, they would themselves be unconstitutional, for they involve doing the very thing which the courts have repeatedly said could not be done, namely, basing a tax upon the production of oil from lands of a restricted Indian, *measured (in part) by the value of the oil so produced.* This would amount to no more than doing circuitously what the courts declare cannot be done directly.

The provisions discussed above are by no means new. They have been on the Oklahoma statute books at least since the year 1916. (Session Laws 1916, p. 105-106; S. L.

1933, p. 204, S. L. 1935, p. 273.) Said provision is noted in the case of *Large Oil Co. v. Howard, supra,* (see 1 col. of p. 540 of Pacific Reporter) also decided by this Court, *supra.* Nowhere has it ever been held that an attempt to get relief under this inapplicable procedure is a prerequisite to a Federal instrumentality asserting, under the generally recognized statutory provisions, its immunity from a void tax.

Turning now to *Alward v. Johnson,* 282 U. S. 509, 75 L. ed. 496, (petitioner's brief, p. 21) that case simply upheld the right of California to lay a tax upon the *property* of one who, *under contract* with the Government, was engaged (among other things) in carrying the mails. A provision of the state constitution required the payment by a company operating trucks for transporting property to pay a tax upon its franchises, trucks, equipment, etc., equal to 5% of its gross receipts. The Supreme Court of California held (*a*) that the truck company was not a Federal agency; and, (*b*) that the tax in question was a property tax (p. 513). This Court affirmed. Apparently the conclusion reached by the court was that the tax was really levied upon the *property* of the trucking company (franchises, trucks, equipment, etc.) although gross receipts were taken as the measuring rod. The court in effect accepted California's determination that this was a property tax, and held that the fact that such property was used in carrying the mails did not spell immunity for it. On page 514 it is said:

> "Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mails."

This is quite different from levying a tax directly upon the *operations* of a Federal instrumentality. The dis-

tinction is exemplified in the later case of *Indian Territory Illuminating Oil Co.* v. *Board of Equalization, supra.* In holding that the oil, after being produced and commingled with other oil, was subject to a property tax, although the *privilege of extracting* it could not be taxed by the state, the court through Mr. Chief Justice HUGHES said:

"*Such immunity as petitioner enjoyed as a governmental instrumentality inhered in its operations as such,* and being for the protection of the Government in its function extended no further than was necessary for that purpose. The holding of the oil in question, which had been segregated and withdrawn from the restricted lands as petitioner's exclusive property, awaiting disposition at petitioner's pleasure, was for its sole advantage and *cannot be said to be so identified with its operations as a governmental instrumentality as to entitle it to exemption from the general property taxes* imposed by the state in return for the protection the state afforded. With respect to these taxes, this oil was in no different case from that of the other oil of petitioner with which it was commingled."

Still later, this Court in *Taber* v. *I. T. I. O. Co., supra,* again distinguished between a state tax upon property of an agent of the Government and one imposing a direct burden on its operations as such instrumentality. In holding that the equipment in and about a producing oil lease covering restricted Indian land was subject to the Oklahoma ad valorem tax the court, again speaking through Mr. Chief Justice HUGHES, said:

"Our decisions distinguish between a non-discriminatory tax upon the property of an agent of government and one which imposes a direct burden upon the exertion of governmental powers. In the former case where there is only a remote, if any, influence upon the exercise of governmental functions, we have held

that a non-discriminatory ad valorem tax is valid, although the property is used in the operations of the governmental agency."

It was recognized, of course, that the gross production tax could not be enforced by the state, upon the *production of oil* from these restricted Indian lands; for if the gross production tax had been applicable, the equipment in and about the producing lease would, under the Oklahoma law, have been exempt from the ad valorem tax. It is also interesting to note that in support of the recognized distinction between the taxation of the *functioning* of a Federal instrumentality and the taxation of its *property* used in and about its operations, the case of *Alward v. Johnson, supra,* is cited. (See p. 4 of the opinion.)

The case of *James v. Dravo Cont'g Co., supra,* was one which dealt with an independent contractor, as will be presently noted, but the court had occasion to consider the difference between taxation of *property* of Federal agencies and taxation of their *operations.* On page 153 of the opinion the court called attention to the distinction between a tax laid directly upon a Government contract or instrumentality, and a tax upon the *property* employed upon such an instrumentality, saying:

"Many years ago the court recognized and enforced the distinction between a tax laid directly upon a government contract or instrumentality of the United States and a tax upon the property employed by an agent or contractor in performance of services for the United States. '*Taxation of the agency is taxation of the means;* taxation of the property of the agent is not always, or generally taxation of the means.' *Thompson v. Union P. R. Co.,* 9 Wall. 579, 591, 19 L. ed. 792, 798."

And the court quotes from *Union P. R. Co. v. Peniston,* 18 Wall. 5, 33, 36, 21 L. ed. 787, 792, 793, in part as follows:

"It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. *A tax upon their property has no such necessary effect.* It leaves them free to discharge the duties they have undertaken to perform. *A tax upon their operations is a direct obstruction to the exercise of Federal powers.*"

III.

An independent contractor is not a true Federal instrumentality and hence the principle of immunity has no application.

A number of cases have been cited wherein this Court has sustained various state taxes upon parties having dealings with the Government, but upon examination it will be found that such parties were not true Federal instrumentalities but were independent contractors. We have been unable to find a single case in which this Court has upheld a state tax levied directly upon the operations of a true Federal instrumentality, unless supported by congressional consent.

In a former section of this brief, at the risk of being tedious, we presented decisions and pointed out pertinent facts showing that respondent in this case does not occupy the position of an independent contractor with the Government, but is a real Federal instrumentality. It is not simply dealing with the Government as a contractor; *the United States is performing certain functions through it.* This distinction should be kept in mind at all times, and clearly

differentiates the situation here from these independent contractor cases cited by petitioner, some of which will now be taken up and considered.

The case of *James v. Dravo Cont'g. Co., supra,* has already been mentioned. It presented the question of the constitutional validity of a state tax imposed upon gross receipts of a contractor under contracts with the United States. The case is not in point as relating to a state tax laid upon the functioning of a Federal instrumentality. This is clearly brought out on page 149 as follows:

"*The tax is not laid upon an instrumentality of the Government: M'Culloch* v. *Maryland,* 4 Wheat. 316, 4 L. ed. 579; *Osborn* v. *Bank of United States,* 9 Wheat. 738, 6 L. ed. 204; *Gillespie* v. *Oklahoma,* 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171; *Federal Land Bank* v. *Crosland,* 261 U. S. 374, 67 L. ed. 703, 43 S. Ct. 385, 29 A. L. R. 1; *Clallam County* v. *United States,* 263 U. S. 341, 68 L. ed. 328, 44 S. Ct. 121; *New York, ex rel. Rogers,* v. *Graves,* 299 U. S. 401, 81 L. ed. 306, 57 S. Ct. 269. *Respondent is an independent contractor.* The tax is non-discriminatory."

Buckstaff Bath House Co. v. *McKinley,* 308 U. S. 358, 84 L. ed. 322, cited by petitioner, is not contrary to our contentions, but rather reinforces them. That is another case which holds that the state may impose a tax upon an independent contractor with the Government. The taxpayer there operated a bath house, which it erected and equipped, under lease from the Secretary of the Interior. The bath house was run as a private business venture for profit by the taxpayer, but by the terms of the lease the bath house on Government property was subject to certain control by the Department of the Interior. Because of this the contention was made by the taxpayer that it was an instrumentality of the United States, and not subject to payment of

state social security taxes as to its employees. In denying this claim the court, speaking through Mr. Justice DOUGLAS, said:

> "*But it seems clear that petitioner is not, within the meaning of the Social Security Act, such an instrumentality.* The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. *Fidelity & D. Co. v. Pennsylvania*, 240 U. S. 319, 60 L. ed. 664, 36 S. Ct. 298. Petitioner's lease from the Secretary of the Interior did not convert it into such an instrumentality. *Petitioner 'is engaged in its own behalf, not the government's, in the conduct of a private business for profit.' See Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17, 23, 78 L. ed. 622, 627, 54 S. Ct. 267. *Though it acts with the Government's permission and has received a privilege from the Government, it does not exercise that privilege on behalf of the latter.*"

We have no quarrel with the above holding. If the taxpayer there had been a real Federal instrumentality the result would have been different. But the Government is not in the bath house business, hence one conducting such a business, even on government-leased property, is not performing a governmental function. The case simply falls under the general classification of independent contractors.

The United States *has* a constitutional governmental duty to perform in the development and operation for oil and gas purposes of the restricted lands of its Indian wards, hence the decisions consistently hold that the lessee under a departmental lease for that purpose *is* a government instrumentality.

Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3, is another case dealing with independent contractors. Cer-

tain contractors with the Government for the construction of an army camp on a cost-plus-a-fixed-fee basis obtained lumber from King & Boozer, the lumber being sold by King & Boozer to the contractor on the contractor's order. Alabama laid a sales tax on the *seller*, but made it the duty of seller to add the tax to the sales price and collect it from the purchaser, which in this case was King & Boozer. Applying the state law of Alabama, as announced by the Supreme Court of that state, it seemed to be conceded that under the provisions of the statute "the purchaser of tangible goods who is subjected to the tax measured by the sales price is the person who orders and pays for them * * *." (p. 10) The Supreme Court of Alabama had held that "the legal effect of the transaction * * * was to obligate the contractors to pay for the lumber." (p. 12) This Court said:

> "The contractors were thus purchasers of the lumber within the meaning of the taxing statute, and as such were subject to the tax." (p. 12)

There was a complete independent step in the passage of title to this lumber before it became incorporated in the army camp and accepted by the Government. The independent contractors, King & Boozer, were the purchasers of the lumber, and thus the fact that it was intended to be used in building something (under contract) for the Government did not exempt it from the sales tax applicable to the sale to the contractor.

The case simply holds, therefore, that a state sales tax imposed upon a purchaser who in turn was an *independent contractor* with the Government, is valid.

Smith v. Davis, 323 U. S. 111, 89 L. ed. 107, turns upon the same principle applied in the *King & Boozer* case, the tax involved being a state tax upon an open account. The

Court held that the fact that the asset taxed accrued as a result of work done by an independent contractor with the Government carried no immunity. We quote from the opinion by Mr. Justice MURPHY as follows:

> "The assets of an *independent contractor* that are derived from the profits of a government contract stand in no preferred constitutional position so far as taxation is concerned."

Penn Dairies, Inc., v. *Milk Control Commission,* 318 U. S. 261, 87 L. ed. 748, holds that independent contractors selling goods to the Government are not agencies or instrumentalities of Government, and hence are subject to state taxes and regulations. We quote from the opinion on page 269 as follows:

> "*We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions: Ohio* v. *Thomas,* 173 U. S. 276, 43 L. ed. 699, 19 S. Ct. 453; *Johnson* v. *Maryland,* 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16; *Hunt* v. *United States,* 278 U. S. 96, 73 L. ed. 200, 49 S. Ct. 38; *Arizona* v. *California,* 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522. *But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions.*"

Wilson v. *Cook,* 327 U. S. 474, 90 L. ed. 793, presents another case where taxpayer's relationship to the United States was that of an independent contractor. It appears that a certain co-partnership "entered into contracts with the United States for the purchase and severance of timber on national forest reserves" (p. 478). The Arkansas Supreme Court upheld the state tax, as against these con-

tractors, of 7c per 1,000 feet of timber severed, and this Court affirmed. The decision apparently turned upon the question of whether these forest reserve lands were an area over which the United States had exclusive jurisdiction, or whether the State also had legislative jurisdiction therein. Under the Federal statute authorizing the purchase from the state of part of the lands (providing that the state should not lose jurisdiction, etc.), and under the Act of Admission as to the remainder of the lands (providing that the legislative authority of the state was extended over such lands), this Court held that the state had legislative jurisdiction over these lands. Citing then cases dealing with independent contractors the Court expressed the opinion that the Supreme Court of Arkansas was correct in holding that these *contractors* to sever timber were subject to the tax. We quote from the opinion on pages 482-483 as follows:

> "Our decision in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 A. L. R. 318, *supra*, and in *Alabama* v. *King & Boozer*, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615, *supra*, and the cases cited in those opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, who are taxed by the state on their activities in severing lumber from Government lands *under contract with the Government*, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state."

Apparently as an after-thought—but too late—the copartnership asserted in this Court that the Government would be adversely affected by an enforcement of the Arkansas taxes in question, in that the statute provided that the party severing the timber and paying the tax might thereafter collect same from the owner. The Court said that it was not free to consider this claim, for the reason

that it was not presented to the Supreme Court of Arkansas or decided by it (p. 483). Thus we have nowhere in *Wilson* v. *Cook* any determination of the vital questions presented in the instant case. In fact the Court on page 480 says:

> "The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground."

There is nothing in *Wilson* v. *Cook* to show that the Court regarded these copartners as Federal instrumentalities. On the other hand the language of the Court quoted from pages 482-483 strongly indicates that they were regarded as *independent contractors.* And under the factual situation there this is evidently what they were. The United States was not performing any governmental functions through these men simply because it had sold to them certain government property. One does not become a Federal instrumentality merely by making a contract to purchase and carry away. There is no analogy between this situation and that of the case at bar, where the United States in response to its duty to its Indian wards is performing the Constitutional, governmental functions of developing and operating restricted Indian lands for oil and gas purposes.

Just as the purchaser of property from the United States, under contract, is not a Federal instrumentality, so the owner of a copyright does not become such an instrumentality. In line with this reasoning it was held in *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 76 L. ed. 1010, cited on page 39 of petitioner's brief, that the state could impose a tax upon gross receipts arising from the licensing of copyrighted ~~moving pictures~~. The rationale of the decision was that a copyright becomes property of its owner, and the fact that it was *derived* from the United States does not con-

stitute its owner an instrumentality of the Government. The situation is likened rather to that of the purchaser of public lands from the Government. The fact that title was derived from the United States does not make the new owner a government instrumentality.

New York v. *United States*, 326 U. S. 572, 90 L. ed. 326, cited by petitioner, certainly is not contrary to the views here expressed. That is not really an independent contractor case, but we may consider it here. The case in substance holds that the State of New York in selling mineral waters was not engaged in a *governmental function*, and therefore could not claim immunity from Federal taxes normally applicable to such sales. It was not part of the conduct of its government for the State of New York to sell mineral water, so it could not claim constitutional governmental immunity upon that ground. As this Court said in *Ohio* v. *Helvering*, 292 U. S. 360, 78 L. ed. 1307:

> "If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function and must find its support in some authority apart from the police power."

IV.

Income resulting from the functioning of a Federal instrumentality is subject to State taxation, although such taxes cannot be imposed upon the operations of the instrumentality.

The decisions of this Court in which it was held that a state has no power to tax the *operations* of one acting under an oil and gas or other mineral lease covering lands of restricted Indians have already been noted. These cases originally dealt only with the immunity from state taxation

as relating to operations, that is, to production under the lease, and in upholding the immunity the Court consistently applied the recognized principles applicable to the functioning of Federal instrumentalities. But the cases did not stop there, for later decisions extended the immunity to include not only the source of income (the operations), but also income itself.

The extension of the immunity to include *income* is contained in such decisions as *Gillespie* v. *Oklahoma,* 257 U. S. 501, 66 L. ed. 338, holding that a state cannot tax *income* derived from a Federal agency (the income referred to being derived from oil produced under restricted Indian leases), and *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 76 L. ed. 815, holding that the United States cannot tax *income* derived from an instrumentality of the state. Under these decisions it was for a time regarded as established that both source of income and income itself were entitled to the immunity. This seems to have been true until the decisions in the cases of *Helvering* v. *Therrell,* 303 U. S. 218, 82 L. ed. 758, 58 S. Ct. 539; *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, 82 L. ed. 907, and *Helvering* v. *Gerhardt,* 304 U. S. 405, 82 L. ed. 1427, were handed down. In the *Therrell* case it was held that the United States could tax income received in the way of compensation paid out of private corporation assets to persons (not state officers) for services rendered in the liquidation of insolvent corporations. In *Helvering* v. *Moutain Producers Corporation* the Court held that *income* derived from operations under an oil and gas lease covering state school lands was not immune from United States income tax. And in the *Gerhardt* case it was held that the United States could tax income received as compensation by employees of the Port of New York Authority, a state instrumentality.

It is a noteworthy fact, which we are sure will not escape the Court's attention, that each of these cases involved a question of the taxability of *income*, and not of the taxability of the *source of income* where that source was a governmental or a state instrumentality.

The Court in the *Mountain Producers Corporation* case, in holding that *income* derived from a state oil and gas mining lease was taxable, expressly overruled the cases of *Gillespie* v. *Oklahoma* and *Burnet* v. *Coronado Oil & Gas Co.*, both *supra*. What the Court did was significant, but what the Court did not do was equally significant. For it will be remembered that the Court had for its guidance, and to be considered by it, controlling decisions holding that not only was the source of income immune from taxation, but also that income produced from such source was likewise immune from taxation by the opposite government, when related to instrumentalities of the United States or of the several states.

This Court, of course, bore these decisions in mind. If, then, it had intended to wipe out entirely the doctrine of the immunity of a governmental agency from state taxation which interfered with or burdened such agency in the performance of its functions, such a broad and sweeping principle would have been announced. What the Court did in each of the three recent cases referred to above was to hold that the *income* was subject to the tax. And it was clearly not by mere chance that in reaching this result this Court overruled the cases of *Gillespie* v. *Oklahoma* and *Burnet* v. *Coronado Oil & Gas Co.*, both *supra*, but *did not overrule Choctaw O. & G. R. Co.* v. *Harrison, I. T. I. O.* v. *Oklahoma, Oklahoma Tax Commission* v. *Barnsdall Refineries, Inc., Jaybird Mining Co.* v. *Weir, Howard* v. *Gypsy Oil Co.*, and *Large Oil Co.* v. *Howard*, all *supra*, all of which

cases had been decided by this Court, and in each of which the Court had held that an instrumentality such as the one involved in the present case could not be taxed by the opposite government in the discharge of its duties. There is a vast difference between taxing a Federal instrumentality in the performance of its functions; and taxing *income* which the agency or instrumentality produces or derives as a result of the performance of such functions. The first is a direct tax or burden upon the instrumentality itself, and is violative of the right to immunity therefrom, and therefore unconstitutional. It is a tax, not upon the income, but upon the *source* from which the income is derived—upon the operations themselves. The second, being at least one step, or possibly further steps removed, does not directly interfere with or impose any tax or burden upon the performance or the functions of the Federal instrumentality, but leaves those functions untouched, and only taxes the *income* after it has been incorporated into the general corporate structure.

The difference in the two situations is apparent. To take a concrete case: Where a departmental lessee is engaged in the performance of its duties and obligations by producing oil, and is therefore functioning as a Federal instrumentality (as, under the decisions is unquestionably the case) and where a tax is directly imposed upon the production of oil, and that tax is measured by the amount or value of oil produced, this constitutes a direct burden upon the Federal instrumentality and is therefore void. But, where no interference or burden is placed upon the Federal instrumentality in the performance of its functions as such, and it is only after the result of such functioning has been to incorporate into the corporate structure some net income which becomes commingled with the corporate funds

that an income tax is imposed, this is so far removed from the functioning of the Federal instrumentality that it cannot reasonably be held to interfere therewith. This, in substance, is the holding of the Court.

To illustrate again, let us assume that a departmental lessee produces oil from the restricted lease and sells the oil. It costs a certain amount to drill and equip wells, to operate the lease and to market the oil. The excess over and above these costs represents net profit which goes into the general fund of the lessee. The same corporation may realize profits from other activities, as to many or most of which it is not functioning as Federal agency. The tax is imposed upon its general net income, including, of course, that derived from its activities as a Federal instrumentality. This is entirely too far removed from the functioning of the Federal instrumentality itself, and is therefore not violative of the constitutional immunity, but is valid. This too is the holding of the Court, and, we submit, with good reason.

As was said above, the claim of immunity from taxation upon the general *income* of a corporation cannot be upheld, because it is too remote—at least a further step removed—even though part of that income was produced as a result of the performance of the duties of one acting as a Federal agency. It is really several steps removed from the performance of such duties. After the oil is produced it has to be sold. The proceeds of the sale go into the corporation's funds, and result in either a profit or a loss. It is entirely too remote to say that any taxes thereafter levied upon the net income of the corporation is a direct tax or burden upon the functioning of the Federal instrumentality itself.

If it had never been held that *income* derived from

the operations of a Federal instrumentality was exempt from state taxation, respondent's immunity with regards to its *functioning* as such agency would probably never have been questioned. But after this Court corrected what it deemed to be an unwarranted extension of the immunity, the Oklahoma Tax Commission jumped to the unwarranted conclusion that the fundamental principles governing the *operations* of such instrumentalities had been swept aside. In other words, petitioner in effect says that because this Court has overruled certain specific cases reflecting such *extension*, and thus has limited the doctrine by cutting it back to its formerly recognized scope, it has completely abrogated the principle of the immunity from state taxation of a Federal instrumentality. It is a clear case of *non sequitur!*

Suppose that a state legislature, in order to induce new industries to come into a state, should provide that the production from new factories should be exempt from taxation for a period of five years. Suppose then that the state Supreme Court first held that this exempted not only the production from the factory but also the *net income* derived therefrom. If the state court should thereafter hold that the *income* was not exempted, and point out the distinction between *income* and *source of income,* would that constitute a basis for claiming that the entire statute had been nullified? Yet that is, in effect, the argument of petitioner here!

In *Graves* v. *New York,* 306 U. S. 486, 83 L. ed. 927, this sharp differentiation between the *source of income* and *income* was clearly recognized. In that case it was held that an employee of Home Owners Loan Corporation (an instrumentality of the United States Government) was subject to the New York income tax. This distinction was clearly expressed by Mr. Justice Stone when on page 480 he said:

"The theory, which once won a qualified approval, that a tax on *income* is legally or economically a tax on its *source*, is no longer tenable." (Citing authorities.)

The *only case* that we know of, from either a state or a Federal appellate court, which tends in any degree to support the contentions of the petitioner under any applicable facts, is that of *Santa Rita Oil Co.* v. *State Board of Equalization*, 116 P. (2d) 1012, decided by the Supreme Court of Montana in 1941. (Petitioner's brief, p. 30.) That case simply misconstrued the effect of *Helvering* v. *Mountain Producers Corp.*, *supra*, and interpreted the decision as not only overruling the cases of *Gillespie* v. *Oklahoma* and *Burnet* v. *Coronado Oil & Gas Co.*, both *supra* (the two cases relating to tax on incomes, and which were the only cases overruled by the Court in the *Mountain Producers Corp.* case), but also as overthrowing the many other decisions of this Court which hold that a state cannot, in the absence of congressional permission, impose a tax directly upon the functioning of a Federal instrumentality.

It is therefore clear that the Montana court by adopting the theory for which petitioner is here contending went off at a tangent in assuming that the doctrine of the immunity of a Federal instrumentality from state taxation had been completely abrogated. In so doing the Montana court failed entirely to make that vital distinction between "income" and "source of income" pointed out by this Court in *Graves* v. *New York*, *supra*.

The decision in the Montana case was not an authority binding upon the Supreme Court of Oklahoma, and that court refused to follow same, although it was urged in support of petitioner's claims in the instant case. Rather, the Oklahoma Supreme Court adhered to the established principles relating to state taxation imposed upon the *operations*

of a Federal instrumentality as laid down by the many decisions of this Court. We are therefore constrained to say that we do not believe that the misinterpretation of the Montana Supreme Court will have any effect upon the fundamental questions of Federal constitutional law presented in the instant case.

Petitioner cannot draw us into a quarrel about such cases as *Helvering* v. *Gerhardt, supra,* (holding that the United States can tax *income* received as compensation by employees of a state instrumentality) and *Helvering* v. *Mountain Producers Corp., supra* (holding that *income* derived from operations under an oil and gas lease covering state school lands is not immune from United States income taxes). We think that we have made our position clear that under the present holdings of this Court the immunity from state taxation of an instrumentality of the United States Government does not extend to *income* derived from the operations of such agency. *But we as earnestly assert that under the decisions as they now stand, a Federal instrumentality cannot, in the absence of congressional consent, legally be taxed by a state upon its operations while engaged in the performance of its essential functions as such, and when the attempted taxes are measured by the products resulting from the agency's operations.*

V.

The passage of title, by inheritance, to restricted Indian property, is not the same as the functioning of a Federal instrumentality, and so is subject to an estate tax levied by the State.

Although for a time it was held that Indian estates were not subject to the inheritance taxes of a state (*Childers* v. *Beaver*, 270 U. S. 555, 70 L. ed. 730), it now appears to be settled that the state may impose such a tax.

—*Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, 87 L. ed. 1612;

West v. *Oklahoma Tax Commission*, 92 L. ed., Adv. Opinions, p. 1220.

These cases are by no means opposed to the principle for which we contend, since *they do not sanction the laying of a state tax upon the operations of a Federal instrumentality.* The passage by inheritance of an estate is by no means the functioning of an instrumentality of the United States in carrying out constitutional duties and obligations of the Government. *The inheritance tax is purely ancillary, and can in no sense be regarded as a direct tax imposed upon the functioning of a government instrumentality.* Thus the very reason for the application of the principle of tax immunity disappears in the estate tax case. Not so as to taxes upon the operations of a Federal instrumentality, for thereby the Government might be seriously hampered in the performance of its constitutional duties. The distinction is clear, and we see no reason for confusing the two situations.

In the very recent case of *West* v. *Oklahoma Tax Commission*, *supra*, attention is called to the fact that the tax is imposed upon the *transmitting and receiving of economic*

benefits. That is a far cry from a state tax laid directly upon the operations of a Federal instrumentality, and requires no further comments on our part. In fact the Court has so clearly stated the real basis of the decision that we would be presumptuous in elaborating. We quote from the opinion by Mr. Justice MURPHY as follows:

> "*An inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. United States Trust Co. v. Helvering,* 307 U. S. 57, 60, 83 L. ed. 1104, 1107, 59 S. Ct. 692; *Whitney v. State Tax Commission,* 309 U. S. 530, 538, 84 L. ed. 909, 913, 60 S. Ct. 635. In this case, for example, the decedent had a vested interest in his Osage headright; and he had the right to receive the annual income from the trust properties and to receive all the properties at the end of the trust period. At his death, these interests and rights passed to his heir. *It is the transfer of these incidents, rather than the trust properties themselves, that is the subject of the inheritance tax in question.*"

See also:

> *Orr v. Gilman,* 183 U. S. 278, 46 L. ed. 196;
> *Cornett's Ex'rs. v. Commonwealth,* (Va.) 105 S. E. 230.

VI.

When confined within its proper limitations the doctrine of immunity of a Federal instrumentality from State taxation remains a part of the basic law of our land.

We are not asking the Court for any extension of the doctrine of the immunity of a Federal instrumentality beyond the limits of its recognized application. We do not here seek the employment of any novel or untried principles, but of a wise and salutary rule which has been fol-

lowed since the early days of the Republic. It is not we, but our opponents who are asking this Court to reverse its long line of decisions relating to the functioning of a Federal instrumentality.

There is no occasion now for abrogating one of the established constitutional principles of our country. If it is deemed wise to waive the immunity and to consent to the imposition of the taxes, Congress is the one to speak, as this Court has so often held. The responsibility for such action rests with Congress, which has acted where it felt there was necessity. Until such time, the immunity continues in effect.

If unwarranted extensions of the doctrine of immunity (as, *e. g.*, income) are announced, these can be, and have been corrected. But what petitioner here is asking strikes far deeper than that. *For the taxes here sought to be enforced by the state are imposed directly upon the operations of a Federal instrumentality.* To permit this would be to nullify completely that principle so necessary to the proper functioning of our dual system of government, and could very conceivably result in unutterable confusion, and in hampering the activities of each government. For this touches, not ancillary matters but the fundamental principles relating to the activities of governmental instrumentalities!

The principle for which we contend was created to prevent any threat or impediment to the functioning both of our national and of our state governments. It is a principle which maintains a healthful balance between them, and enables each properly to perform its governmental functions. It is by no means an obsolete doctrine, but is as virile and necessary now as when first announced. The first

paragraph of the syllabus of *United States* v. *County of Allegheny*, 322 U. S. 174, 88 L. ed. 1209, reads as follows:

> "Properties, functions, instrumentalities, institutions and activities of the United States, are not, in the absence of express congressional consent, subject to any form of state taxation."

This case was decided some time after the *Mountain Producers Corporation* case, *supra*, and shows that there was no intention by the court (as petitioner seems to think) to sweep away the fundamental principles of immunity from state taxation applicable to the operations of Federal instrumentalities.

We quote from the opinion by Mr. Justice Jackson in the *Allegheny* case as follows:

> *"But since 1819, when Chief Justice Marshall in the M'Culloch case expounded the principle that properties, functions, and instrumentalities of the Federal Government are immune from taxation by its constituent parts, this court never has departed from that basic doctrine or waivered in its application."*

See also:

Standard Oil Co. of California v. *Johnson*, 316 U. S. 481, 86 L. ed. 1063.

Conclusion.

Under the conceded facts of this case and under the law applicable thereto as shown by the repeated decisions of this Court covering a period of many years, respondent is a true instrumentality of the Federal Government, functioning as such in so far as relates to the production of the oil in question, and is entitled to immunity from state taxa-

tion imposed upon its operations in the production of such oil. The judgment of the Supreme Court of Oklahoma was therefore correct and should be affirmed.

Respectfully submitted,

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November, 1948.

APPENDIX I.

Opinion filed September 23, 1947, by Supreme Court of Oklahoma:

"Syllabus: 1. A lessee producing oil from lands of restricted Kiowa and Apache Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state excise tax of one-eighth of one cent per barrel, nor the state gross production tax of five per cent of the value of the oil produced."

"Appeal from the District Court of Oklahoma County, Lucius Babcock, Judge. (fol. 72.) Action by The Texas Company, a corporation, against the Oklahoma Tax Commission to recover certain oil excise taxes and gross production taxes paid under protest of illegality. From an order sustaining demurrer to plaintiff's petition and rendering judgment for defendant, the plaintiff appeals.

"Reversed.

"Ames, Monnet, Hayes and Brown, of Oklahoma City, Okla., Y. A. Land, John R. Ramsey, B. W. Griffith, all of Tulsa, Okla., for plaintiff in error.

"Æ. L. Mitchell and C. W. King, of Oklahoma City, Okla., for defendant in error.

"Opinion—Filed September 23, 1947."

WELCH, J.:

"This action tests the validity of certain state tax assessments, gross production and oil excise tax, made against The Texas Company for oil production under departmental leases on restricted lands of Kiowa and Apache Indians. (fol. 73.) The plaintiff, hereinafter referred to as 'Company,' paid the taxes under protest to the Oklahoma Tax

Commission, (hereinafter referred to as 'Commission,') and sued for recovery back. Plaintiff claimed there was legal immunity from such taxes because in the operation of such leases and in the production of such oil, 'Company' was an instrumentality of the Federal Government.

"That such a lease is an instrumentality of the Federal Government has been held in many cases hereinafter cited. Among the first such cases, if not the first, was *Indian Territory Illuminating Oil Company* v. *Oklahoma*, 240 U. S. 522, 60 L. ed. 779.

"As applied to a gross production tax on oil, the exact contention of 'Company' of immunity from such tax was sustained in *Large Oil Co.* v. *Howard*, 248 U. S. 549, 63 L. ed. 416, and in *Howard* v. *Gypsy Oil Co.*, 247 U. S. 504, 62 L. ed. 1239.

"And the United States Congress has acted on the theory that such immunity exists in the case of leases of this character unless waived. The Congress has adopted acts expressly waiving such immunity and granting to this state the authority to apply the gross production tax as to certain designated Indian lands, the Osage Indian Lands by act in 1921 (41 Stats. at L. 1250), the Kaw Indian Lands (fol. 74) by act in 1924 (43 Stats. at L. 176-177), and as to lands of the Five Civilized Tribes by act in 1928 (43 Stats. at L. 496).

"As applied to the oil excise tax the exact contention of immunity from such tax here made by 'Company' has been sustained by this court in *Barnsdall Refineries, Inc.*, v. *Oklahoma Tax Commission*, 171 Okl. 145, 145 P. (2d) 918, affirmed in *Oklahoma* v. *Barnsdall*, 296 U. S. 521, 80 L. ed. 366.

"Thus it has been established and for many years recognized in this court, in the Congress and in the Supreme Court of the United States, that in the case of such leases neither of the taxes here involved may be imposed without waiver of immunity or permissive legislation by the Congress.

"But the 'Commission' contends that, in foundation, the above rule rests upon other and former decisions of the Supreme Court of the United States dealing generally with the 'governmental instrumentality' rule, and that all such former decisions as well as those heretofore cited, were in effect overruled in *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 82 L. ed. 907.

"Upon consideration of that point we observe the *Mountain Producers* case relates to income tax assessed against the net income or personal profit earned by a lessee in a position (fol. 75) similar to that of 'Company.'

"Long prior to the *Mountain Producers case* that court had extended the governmental instrumentality rule to include such personal income or profit within the tax immunity, and had held that income tax could not be assessed against such an oil and gas lessee. See *Gillespie* v. *Oklahoma*, 257 U. S. 501, 66 L. ed. 338, and *Burnett* v. *Coronado Oil and Gas Co.*, 285 U. S. 393, 76 L. ed. 815.

"The decision in the *Mountain Producers* case was a reconsideration of that exact income tax question, and in the latter case that court held that such extension of the governmental instrumentality rule was without adequate foundation or support; and that court expressly overruled the two former decisions, the *Gillespie* case and the *Burnett* case, and expressly held in the *Mountain Producers* case that the income tax might properly be assessed.

"While that court thus specifically restricted the limits of the governmental instrumentality rule to that extent, we do not find in that decision any abolition of the rule, or any further departure from former application of the rule than is specifically made in and by that decision.

(fol. 76) "The *Mountain Producers* case specifically overruled the two former income tax cases mentioned, but did not expressly overrule either of the gross production tax cases above cited nor the *Barnsdall* case, *supra*, nor indicate any specific intention of so doing.

"It is the view of the writer of this opinion, speaking for himself alone, that for the reasons pointed out in the briefs one might well join in the request that the Supreme Court of the United States reconsider this question as applied to a tax on the oil as it did reconsider the question as applied to the tax on the personal income or net profit of the oil producer, which consideration resulted in a reversal of the rule as to such income tax as we have noted. But it is thought beyond the power of this court to now engage in such reconsideration, in view of the cited decisions of the higher authority which thus far wholly sustain the claim of 'Company' to immunity from the tax here involved.

"Upon questions of federal law, citizens and their attorneys have the right to rely upon decisions of the Supreme Court of the United States, and upon such questions it is our fixed duty to follow such decisions, leaving to the United States Congress or Supreme Court the making of the necessary changes in such legal rules.

(fol. 77) "In a later case, *United States* v. *County of Allegheny*, 322 U. S. 174, 88 L. ed. 1209, the Supreme Court of the United States recognized that in the *Mountain Producers* case the rule of implied immunity had been 'sharply curtailed,' but that is not to say an abolition of the rule, but a limitation or curtailment thereof, definitely leaving the balance thereof in full force.

"Other authorities are cited to support the view of 'Commission' as to the implied or extended effect to be given the *Mountain Producers* decision. We have considered them but find further discussion of them not necessary, other than to say that we cannot construe the decision in the *Mountain Producers case* to go to the extent contended for.

"We regard the decisions of the Supreme Court of the United States, *supra*, as binding upon us, and in view thereof the plaintiff's petition stated a cause of action. It was error to sustain a demurrer thereto.

"The judgment for defendant is reversed, with directions to overrule the demurrer to plaintiff's petition and proceed consistent with the views here expressed.

"Hurst, C. J.; Davison, V. C. J.; Riley, Gibson and Luttrell, JJ., concur.

"Corn, J., dissents."

APPENDIX II.

Title 68, Oklahoma Statutes Annotated:

Sec. 1475. *Action to Recover Taxes as Additional Remedy to Aggrieved Taxpayer—Payment of Taxes—Notice of Intention—Refund if Taxpayer Prevails—Scope of Remedy—Process—Parties—Payment Under Protest Pending Judicial Determination of Questions in Another Action.*

In addition to the right of appeal to the Supreme Court provided for in Section 26 of this act, a right of action is hereby created to afford a remedy to any taxpayer aggrieved by the provisions of this act or of any other state tax law, or who resists the collection of or the enforcement of the rules or regulations of the Tax Commission relating to the collection of any state tax.

Any such taxpayer shall pay the tax to the Tax Commission and at the time of making such payment shall give notice to the Tax Commission of his intention to file suit for recovery of such tax. Upon receipt of such notice the tax so paid shall be segregated and for a period of thirty (30) days shall be held by the Tax Commission in its depository account with the State Treasurer. If suit be filed within such thirty (30) days' period, the fund so segregated shall be further held until the final determination of the suit. If the taxpayer prevails the Tax Commission shall, by cash voucher drawn by the Tax Commission upon its depository account with the State Treasurer, refund to the taxpayer the amount of tax determined not to be due pursuant to the final judgment of the court having jurisdiction, together

with interest on such amount at the rate of three per cent (3%) per annum from the date of payment by the taxpayer to the date of the court's final order.

This section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and the subject matter. It shall be construed to provide a legal remedy in the state or federal courts by action at law in cases where the taxes complained of are claimed to be an unlawful burden on interstate commerce, or the collection thereof violative of any congressional act or provision of the Federal Constitution, or in cases where jurisdiction is vested in any of the courts of the United States: In all actions brought here under service of process upon the Chairman of the Oklahoma Tax Commission shall be sufficient service, and the Tax Commission shall be the sole, necessary and proper party defendant in any such suit, and the State Treasurer shall not be a necessary or proper party thereto.

Upon request of any tax payer and upon proper showing that the principle of law involved in the assessment of any tax is already pending before the courts for judicial determination, the taxpayer, upon agreement to abide by the decision of the court, may pay the tax so assessed under protest, but need not file a suit. In such case the tax so paid under protest shall be segregated and held by the Tax Commission in its depository account until the question of law involved shall have been determined by the courts, and shall then be disposed of as herein provided.